

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. Z-817794-D4 "R"
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: FRANCISCO J. PEREIRA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2003

FRANCISCO J. PEREIRA

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 11 July 1973, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for four months outright plus two months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Second Pumpman on board the United States NS YUKON under authority of the document above captioned, on or about 3 January 1973, Appellant wrongfully deserted the said vessel at Kwajalein Atoll (United States Trust).

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records from the USNS YUKON, and the depositions of two witnesses.

In defense, Appellant offered in evidence overtime sheets from the voyage, a copy of part of his medical records, a letter specifying travel instructions, and his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents, issued to Appellant, for a period of four months outright plus two months on 12 months' probation.

The entire decision and order was served on 18 July 1973. Appeal was timely filed.

FINDINGS OF FACT

On 3 January 1973, Appellant was serving as a Second Pumpman on board the United States NS YUKON and acting under authority of his document while the ship was at Kwjalein Atoll Trust Territory of the Pacific Islands.

On the above date at approximately 1600, Appellant was relieved of his duties as Pumpman by the chief Pumpman. Prior to this time Appellant had been on watch continuously for some twenty hours, but had not complained to the Master of the Chief Engineer that he was being overworked and had not requested relief from this or previous overtime work during the voyage. After being relieved, Appellant visited the Chief Engineer and advised him that he, Appellant, was tired of fighting "with you people" and that he was going to pack his gear and get off the vessel. Appellant refused to discuss the matter further with the Chief Engineer and reaffirmed his position that he was leaving the vessel.

After notifying the Master and other crew members that he was quitting the ship, Appellant left the vessel at 1900 with all of his gear, including his clothes and souvenirs which he had purchased during the voyage. He was observed departing the vessel with a number of suitcases and boxes and a subsequent examination of his quarters by the Master and Chief Engineer revealed that he had left nothing behind.

Prior to the departure, Appellant had not mentioned that he desired medical attention or that he felt he was unfit for duty. Neither did he request a Master's Certificate for a physical examination, although, the Master was onboard the vessel at the time. At 1910 the Master logged Appellant in the official ship's log as a deserter. When the vessel departed Kwajalein Atoll on 4 January 1973, the appellant was not on board.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the findings of fact are contrary to the weight of the evidence and the conclusions are incorrect.

APPEARANCE: Abraham E. Freedman of New York, New York by Martin L. Katz. Esq.

OPINION

I

In support of his grounds for appeal as stated above, Appellant argues that he had worked a great deal of overtime during

the voyage, particularly just prior to his departure from the vessel, and implies that the resultant fatigue coupled with the animosity he alleged existed between himself and the Master provides a justification for his quitting the vessel.

This theory, like the other arguments advanced in the brief, are based on the assumption that the Administrative Law Judge was in error in not accepting Appellant's account of the events and his interpretation of their significance. This position cannot be sustained. I have held many times that questions of credibility of witnesses and weight to be assigned particular evidence are matters within the discretion of the Administrative Law Judge and that his discretion will be accepted by me on appeal absent a showing that the decision reached was arbitrary or capricious. Once this fundamental principle of administrative law is understood, all of Appellant's arguments collapse.

In regard to this particular argument, the Administrative Law Judge did not accept Appellant's testimony that he had a longstanding dispute with the Master because of his union affiliation and his testimony that he was forced to work long overtime against his will. The fact that appellant voluntarily performed the overtime is not violative of any statute and does not provide justification for desertion. Even if the Judge had accepted the testimony regarding coercion by the Master, it would have been incumbent upon appellant to have sought relief from appropriate officials before he simply quit the vessel. I find that there is sufficient evidence in the record upon which the Administrative Law Judge could have based his findings in regard to this argument and accept his determination.

Appellant also makes much of the fact that he visited a medical clinic in Kwajalein after leaving the ship, hoping to raise the inference that he was denied proper medical attention and therefore was justified in resorting to extraordinary means to obtain it. The facts as found by the Judge do not bear out this argument. Appellant did not complain of medical problems or ask for a Master's Certificate for a physical examination. As in the situation with the alleged difficulties with the Master concerning overtime work, Appellant must have exhausted the available remedies open to him before he can claim justification for his desertion of the vessel. It is also noteworthy that the medical examination which he received in Kwajalein disclosed no physical hindrances to Appellant's performance of duty.

III

Appellant's final contention is that he offered to return to the vessel in Hawaii and hence cannot be guilty of desertion, but,

at best, only of a failure to join. Again, Appellant's averment is contrary to the evidence as found by the Judge. At the hearing the Judge was presented with the testimony of Appellant that he had offered to return to the ship's service and the conflicting statement of the Master that he did not so attempt. As stated above, the question of credibility was for the Judge to decide. He determined that Appellant's statements on this point were not credible. This decision will be upheld when, as here, there is sufficient evidence in the record to have justified the determination. In any event, the mere fact that Appellant may have offered to return to the vessel at a later time does not necessarily negate the finding that he deserted the vessel in Kwajalein Atoll. "Desertion in the sense of maritime law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not to again return to the ship's duty." Cloutman v. Tunison, 5 Fed. Cas. 1091, 1093 (Fed. Case 2,907, Cir. Mass. 1833). There was sufficient evidence in the record, including statements of Appellant, his removal of all of his belongings from his quarters, and the entry in the official log, from which the Judge could have found the necessary intent to permanently quit the vessel at the time of leaving. See Guiness v. United States, 149 Ct. Cl. 1 (1960). As I stated in Appeal Decision No. 1642: "It is true that desertion is established once there is shown a wrongful absence from the vessel with intent never to return. I think that desertion also occurs when there is a wrongful absence at a given port coupled with an intent not to be aboard the vessel on its departure from that port." No. 1642 at p. 10. Here, as in the above cited cases, Appellant committed a desertion of the vessel when he departed without authority with the intent not to return. The fact that he may have subsequently entertained a different intention regarding the vessel does not alter the character of the original act. Had the Master taken him back into the ship's service, there may have been a situation of condonation, but that factual situation is not here present.

CONCLUSION

I find that the findings and conclusions of the administrative Law Judge are based on substantial evidence of a reliable and probative nature and that the order of suspension was appropriate under the attendant facts and circumstances.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 11 July 1973, is AFFIRMED.

O. W. SILER

Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 8th day of July 1974.

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